(3)

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

REPLY BRIEF OF PETITIONER

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I.

The present action to recover prejudgment interest on gas royalties paid out by Sun Oil Company in July, 1976, and in 1978, was not commenced until August, 1979, more than three years after the 1976 payout. (A3-A4). Accordingly, more than 90% of the claims related to Sun's July, 1976, payout would be barred by the limitations statutes of Texas, Oklahoma and Louisiana. The Kansas Supreme Court did not contest this conclusion, and respondents are unable to cite any authority to the contrary. The gas leases under which petitioner paid the 1/8th fractional royalty did not require interest. The claim was one in equity for unjust enrichment, based on implied contract or quasi-contract, to which the two-year statute of Texas, and the three-year statutes of Oklahoma and Louisiana apply. (Sun's Petition, p. 5, footnote 2).

Being unable to deny the continuing conflict illustrated by *Schrieber v. Allis Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), and *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987), respondents choose to ignore the substantial reasons why this Court should decide the constitutional issues arising under the Full Faith and Credit Clause, and the Due Process clause. Respondents cannot dispute the existing conflict in recent decisions, including this very case. They cannot deny the contemporary scholarly criticism of *Schreiber,* and of the broad dictum in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953). Like the emperor who had no clothes, respondents pretend the problem doesn't exist.

Whether the Constitution permits a forum state to disregard the shorter limitations law of the state wherein the claim arose, an issue not directly decided by *Wells,* is an issue far broader and deeper than a mere conflict among the recent decisions, including this case. The flood of problems flowing from technological and commercial disputes in an expanding economy and population, together with widely varying limitations laws among the states, has already catapulted this issue into prominence. One example is the nationwide asbestos litigation, in which a parade of lawsuits are being filed in distant forums having limitations statutes longer than states wherein the claims arose. These include federal forum transfer questions, as in *Ferens,* which depend for their solution on the precise issue here presented. (The National Law Journal, Vol. 10, No. 1, page 1, September 14, 1987, "Courthouse Doors Are Reopened", by Edward A. Adams.) Similar issues are now arising in the burgeoning area of toxic tort litigation, as well as other areas of products liability, commercial tort and contract actions.

Respondents erroneously contend that the limitations issue does not exist in this case because the first Kansas Supreme Court decision (236 Kan. 266, 690 P.2d 385) was vacated by this Court for reconsideration in light of *Phillips Petroleum Company v. Shutts,* 472 U.S. 797 (1985); and *Shutts* did not involve a limitations issue because the suit was brought more promptly. But petitioner, at every stage, has raised its constitutional objections to the application of Kansas law to claims arising in other states. Those objections included failure to recognize the other states' limitations laws, as well as laws governing the liability issue and rate of interest issue found in *Shutts.* Accordingly, this Court's remand for reconsideration in this case required the Kansas courts to reconsider application of other state's laws to the claims before it, including the limitations laws. Certainly nothing in the remand could have removed or rejected Sun's constitutional rights preserved at every stage of this litigation.

Respondents also fail to realize, as the Seventh Circuit has in *Beard v. J.I. Case,* 823 F.2d 1095 (1987), that this Court's *Shutts* decision itself calls into question the conclusions expressed in *Wells* and *Clay* on the limitations issue.

Next respondents seek to support the correctness of the Kansas courts' application of Kansas' longer limitations statute by reference to the dictum in *Wells,* supra; to a hornbook recitation that limitations statutes are "procedural" only, and to *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945).

Wells merely allowed the forum state to apply its own shorter limitations statute. Whether the dictum complained of by Mr. Justice Jackson in dissent, and as criticized by legal scholars, should be limited and made inapplicable to

a forum state seeking to impose its longer statute, is an important and primary question presented. At the same time, we see substantial reasons why this Court should also consider whether a forum state must constitutionally apply the longer limitations statute of the state wherein the claim arose; and thus whether *Wells* should be overruled.

Limitations laws are more than procedural and remedial, in completely barring a claim when time has expired, as legal scholars agree. And merely because a state may describe a limitations statute as "procedural and remedial" for collateral purposes, or even so that it may apply its own limitations law, can never change the real impact on the claim and on the parties. That impact is one of substance because it determines whether a claim is alive or dead. It does not merely govern a procedure for processing a claim, nor choose among potential remedies.

Finally, respondents quote from *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945), as though it supported their position. It does not. Justice Jackson (who later dissented in *Wells*) wrote for a unanimous Court, holding that a state may lengthen its own limitations statute applicable to claims arising in that state which are already barred, so long as vested rights are not extinguished:

> ". . . The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation." (325 U.S. at 315).

The Court's opinion noted that *Campbell v. Holt,* 115 U.S. 620 (1885), involving the same issue, had adopted as a "working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." Justice Jackson, while accepting the result and the ultimate holding,

described the above reasoning of *Campbell v. Holt* as "unsatisfactory rationalization." (325 U.S. at 314).

It is just such "unsatisfactory rationalization" which the Third Circuit in *Ferens,* and an array of legal scholars, have rejected in forbidding, on constitutional grounds, the application of the forum state's longer limitations laws to claims barred by the state in which they arose. The foregoing comment in *Chase Securities Corp.* simply reinforces the need to expunge the "unsatisfactory rationalization" that statutes of limitations are remedial for constitutional purposes, to prevent its improper application to the present constitutional issue.

Our constitutional rights, above all rights, emanate from and apply to substance and reality. If governed by an "unsatisfactory rationalization" that limitations laws are merely procedural for constitutional purposes in applying the laws of other states, these basic rights are effectively denied.

The present issue, left open by *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 778 (1984), is ripe for decision, and is squarely presented in this case.

II.

The conflict between the decision below, and this Court's *Phillips* decision, is clear from respondents' brief itself, which tries to explain away the 6% per annum interest rate required by Texas constitutional and statutory law. Respondents, as did the court below, would ignore the 6% rate imposed in *Phillips Petroleum Co. v. Stahl Petroleum Co.,* 569 S.W.2d 480 (Tex. 1980), by arguing that Texas would allow a higher "equitable" rate in such cases, if sought by claimant. The argument that "equity"

would permit a rate higher than Texas' 6% statutory rate was later specifically rejected in *Mo.-Kan.-Tex.R.Co. v. Fiberglass Insul.*, 707 S.W.2d 943, 947 (Tex. Civ. App. 1986, Error Refused, NRE, June 25, 1986):

> "We conclude that *Stahl* allows courts to award prejudgment interest on equitable grounds at the six percent legal rate of art. 5069-1.03 when no statute provides for such a recovery. It thus enlarges the class of cases in which prejudgment interest may be granted without increasing the rate of equitable prejudgment interest that may be awarded."

Yet respondents and the lower court ignore that conclusive ruling rejecting their position concerning *Stahl*, just as they ignore this Court's *Phillips* opinion noting that ". . . Texas has never awarded any such interest at a rate greater than 6%. . . ." (472 U.S. at 817).

Oklahoma, by statute, extinguishes liability for interest if the principal is paid and accepted, as here. Okla. Stat., tit. 23, Sec. 8. Louisiana does not impose liability for interest on a royalty owner who owes a refund for overpayment, under similar circumstances. *Whitehall v. Boagni*, 255 La. 67, 229 So.2d 702 (1969). Interest liability, if imposed, is 6% per annum in Oklahoma, and 7% in Louisiana, as this Court observed in *Phillips*, 472 U.S. at 817. Petitioner does not at all concede that Oklahoma and Louisiana impose liability for interest, as asserted by respondents. Rather, the Kansas courts' patent disregard of rates of interest established by Texas wherein most of the claims arose, as well as by Oklahoma and Louisiana, amply and clearly demonstrates the violation of petitioners' federal constitutional rights, as set forth in *Phillips*.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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